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No. 89-947

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

J. JOSEPH CURRAN, JR.,
ATTORNEY GENERAL OF MARYLAND, *et al.*,
Petitioners,

v.

ALFRED MULLER, M.D. AND
FRIENDSHIP HEIGHTS VILLAGE COUNCIL,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a Maryland statute regulating municipal incorporation violates the Equal Protection Clause by granting a small group of property owners, determined on the basis of the value of their property, the power to block a popular vote by thousands of residents on the question of municipal incorporation.

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT

1. *The Statutory Scheme.* The sole means for an unincorporated area in Maryland comprised of 300 or more residents to become a municipality is provided by Article 23A, §§ 20-28 of the Annotated Code of Maryland (1987 Repl. Vol.). Under that Article, the final step toward municipal incorporation is a referendum among the registered voters of the area proposed for incorporation, in which all registered voters cast an equal vote.

Before such a referendum can be presented to the electorate, Section 21 of Article 23A (Pet. App. 16a-17a) requires that two conditions be satisfied. First, the proponents of municipal incorporation must present a petition to the Board of Commissioners or the County Council of the relevant county, signed by at least 20 percent of the registered voters within the area proposed for incorporation. Second, the petition must also be signed by the owners of at least 25 percent of the assessed value of the real property within the area. (Pet. App. 16a.) Once a petition satisfying both conditions is presented, the County Board or Council may, and routinely does, direct that a referendum be held.[1]

2. *Factual Background.* Approximately 5,000 persons reside in the Villages of Friendship Heights and the Hills ("Friendship Heights"), which are located in Montgomery County, Maryland, just north of the District of Columbia.[2] Approximately 50 percent of the

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[1] During the 1986-87 period involved in this case, Section 21 of Article 23A provided that, upon fulfillment of the petitioning requirements, the County Board or Council "may" pass a resolution specifying the date "for the election at which the question of incorporation shall be submitted to the voters of the particular area." Art. 23A § 21 *Ann. Code of Md.* (1987 Repl. Vol.). This feature of Section 21 was amended, effective July 1, 1988, to provide that the County Board or Council "shall" specify the date of the election if the petitioning requirements are met, but may "reject" the referendum request provided that the reasons for doing so are made available in writing to the general public and procedures for reconsideration are established. Art. 23A, § 21, *Ann. Code of Md.* (1988 Suppl.) (Pet. App. 16a-17a). Because the petitioning requirements of Section 21 were not changed in any respect, this amendment has no effect on the issue presented here.

[2] Friendship Heights is presently a "Special Tax District," created pursuant to Sections 66-7 and 66-8 of the Montgomery County Code.

assessed value of real property in that area is owned by five business entities or individuals. (Joint App. 45-46.)

In September 1986, respondents Alfred Muller, M.D. (Chairman of the Village Council and a non-property owning resident of Friendship Heights) and the Friendship Heights Village Council (the elected governing body of Friendship Heights) initiated the petitioning process through which the question of municipal incorporation would be presented to the registered voters. By April 1987, residents of Friendship Heights had collected the petition signatures of 27 percent of Friendship Heights' 2,420 registered voters (Pet. App. 11a), thus satisfying the first of the statute's petitioning requirements. However, respondents were unable to obtain the signatures of the owners of more than 16 percent of the assessed value of the real property in Friendship Heights, and thus failed to satisfy Section 21's property-owner assessed value petitioning requirement. (Pet. App. 11a.)[3]

The failure to satisfy this property-owner petitioning requirement is rooted in the fact that only a few entities own most of the assessed value of the real property in the 32-acre Friendship Heights area, which consists almost entirely of high-rise office buildings and large apartment or condominium buildings. Only two of the fifteen largest property owners were willing to sign the

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[3] Had Section 21 required the signatures of 25 percent of the property owners, as opposed to the owners of 25 percent of the assessed value of the real property in the area, the petition requirement would have been met. Of the then 1,460 property owners in the area, 421 (or 28%) signed the petition. ("Plaintiffs' Opp. to Defendants' Motion for Summary Judgment" at 11, n.11, filed Jan. 7, 1988.)

petition.[4] The ownership of most of the remaining real property in Friendship Heights is divided among hundreds of owners of small condominiums, each having an assessed value which is a small fraction of the value of the property owned by those largest property owners unwilling to sign the petition. Accordingly, respondents were unable to satisfy the property/valuation requirement necessary to proceed with submitting the issue of municipal incorporation to a referendum of all registered voters in Friendship Heights.

3. *The Decision of the District Court.* Respondents filed suit in May 1987 against the Maryland Attorney General (Hon. J. Joseph Curran, Jr.) and the Montgomery County Council, seeking a declaratory judgment that the property-owner petitioning requirement of Article 23A, Section 21 violates the Equal Protection Clause. Two of the five largest owners of property in Friendship Heights intervened as defendants in the action—petitioners Friendship Properties and The Barlow Corporation—and the parties submitted cross-motions for summary judgment.

On July 8, 1988, the United States District Court for the District of Maryland upheld the constitutional validity of the Maryland municipal incorporation statute. In so holding, the court noted that respondents "have complied with Article 23A to the extent possible," but that their inability to collect the requisite percentage of petition signatures from property owners "prevented them

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[4] "Answers of Plaintiff Friendship Heights Village Council to Interrogatories of Defendant Curran," No. 8, annexed to Memorandum in Support of Plaintiffs' Motion for Summary Judgment (filed December 1, 1987).

from presenting their petition to the Montgomery County Council." (Pet. App. 10a-11a.)

The district court nevertheless determined that the property-owner petitioning requirement of the Maryland statute did not unconstitutionally infringe upon the right to vote of Friendship Heights residents because the petition procedure "is not an election," and "participation in a petitioning process is not tantamount to voting." (Pet. App. 11a-12a). The district court next determined that the property-owner petitioning requirement in the Maryland statute has a "rational basis" in that it provides property owners an opportunity to participate in decisions affecting the form of local government, which may result in "increased development for the area, higher real estate taxes, or diminished public services." (Pet. App. 13a.)

4. *The Decision of the Court of Appeals.* The court of appeals reversed. Applying the pertinent decisions of this Court, the court ruled that the property-owner petitioning requirement was unconstitutional on equal protection grounds, because "[t]he challenged Maryland procedure permits a popular vote to be blocked by property owners." (Pet. App. 5a.) The court of appeals held that such a scheme "offends equal protection principles unless a compelling state interest is present" and that there was no compelling state interest in this case.[5]

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[5] The court of appeals, applying Maryland law, refused to sever the unconstitutional provision of Section 21 from the remainder of the municipal incorporation statute. On respondents' petition for rehearing on the severability issue, and after additional briefing and argument thereon, the court filed its opinion adhering to its initial view on severability.

ARGUMENT

The judgment of the court of appeals is correct. There is no conflict among the courts of appeals or between any federal court and a state court. The paucity of lower court decisions in the area and the unique circumstances of this case show that the issue presented is not of recurring importance. The court of appeals merely applied settled principles to the factual situation presented here. Further review is therefore not warranted.

1. Petitioners suggest that seven other states have statutes similar to Maryland's, which of course means that forty-two states do not. In fact, only two states have analogous provisions.[6] Petitioners, however, are unable to provide any information regarding how those statutes are administered in practice and, more important, whether such states contain unique areas like Friendship Heights where a handful of entities own most of the property inhabited by thousands of voters.

Furthermore, if a case such as this ever did arise in some other area and if a decision were rendered con-

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[6] Of the seven state statutes cited by petitioners (Pet. 9 n.3), only one requires the petition signatures of both electors and the owners of a percentage of the assessed value of the property. Another requires the petition signatures of both electors and the owners of a certain percentage of property. *See* N.D. Cent. Code §§ 40-02-01, *et seq.* (1983 and 1989 Supp.) (requiring petition signed by one-third of electors and the owners of 50 percent of the assessed value of the property); Ala. Code §§ 11-41-1, *et seq.* (1989 Repl. Vol.) (requiring petition signed by 15 percent of electors, at least four electors who reside on each quarter section of the land to be incorporated and the signatures of the owners of at least 60 percent of the acreage). There is no indication that either of these statutes has ever been used to block an election.

trary to the ruling below, there would then be an occasion for the Court to resolve the resulting conflict. As matters now stand, however, only the court below and two state supreme courts have addressed the issue and they are in complete agreement.

2. Petitioners incorrectly claim that the decision of the court of appeals conflicts with *Delgado v. Smith*, 861 F.2d 1489 (11th Cir. 1988), *cert. denied*, 109 S. Ct. 3242 (1989); and *Montero v. Meyer*, 861 F.2d 603 (10th Cir. 1988), *cert. denied*, 109 S. Ct. 3249 (1989). Neither case was decided under the Equal Protection Clause. Both cases involved a question of statutory interpretation—namely, whether under Section 1973b(f)(4) of the Voting Rights Act, 42 U.S.C. §§ 1971 *et seq.*, privately-circulated initiative petitions to amend the state constitution had to be printed in both Spanish and English. Reviewing the language of the Act and its legislative history, both courts held that such private petitions were not "materials or information relating to the electoral process" within the meaning of the Act and did not constitute "state action" regulated by the Act. *Delgado*, 861 F.2d at 1492, 1498; *Montero*, 861 F.2d at 609-10.

The court below thus did not rely on these decisions for good reasons. This case does not involve the Voting Rights Act and it does not involve any questions concerning the language contained in private petitions. Unlike *Delgado* and *Montero*, the procedure at issue here did indeed constitute state action. The Maryland statute specifically conferred upon a few property owners the complete and unbridled power to veto an election by thousands of voters residing in the area proposed for incorporation.

3. The decision below is consistent with earlier Fourth Circuit decisions and with decisions of two state

supreme courts. In determining that the property-owner petitioning requirement was unconstitutional, the court of appeals below applied its earlier holding in *Hayward v. Clay*, 573 F.2d 187 (4th Cir.), *cert. denied*, 439 U.S. 959 (1978), a decision no other federal court has questioned. In *Hayward*, the court of appeals invalidated on Equal Protection grounds the requirement of a property-owner referendum as a prerequisite to a general election because it "in effect . . . grants to some individuals—who are identified on the basis of ownership of realty—the right to nullify a vote for annexation by the electorate at large." (573 F.2d at 189.)[7]

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[7] The South Carolina statute in *Hayward* conditioned the holding of an annexation election upon a favorable majority vote of the property owners in the area to be annexed. Upon certification of an annexation petition by the governing council of the annexing municipality, a majority of the property owners in the area proposed for annexation had to approve the change in a referendum "[a]s a prerequisite to the annexation election." (573 F.2d at 189.) An effective annexation proceeding also required approval by the registered voters in both the territory to be annexed and the annexing municipality. The property-owner election could precede or be held simultaneously with the annexation election.

The court of appeals below distinguished its holding in this case and in *Hayward*, from its decision in *Berry v. Bourne*, 588 F.2d 422 (4th Cir. 1978). At issue in *Berry* was whether a South Carolina annexation statute providing an alternative annexation method to that invalidated in *Hayward* violated the Equal Protection Clause by permitting a city to annex upon a petition signed by 75 percent of the property owners in that area and the approval of the annexing city's governing body. The *Berry* court upheld the statute on the settled grounds that "there is no basis for an equal protection claim when [no] one is granted the right to vote on the matter of annexation." 588 F.2d at 424.

The court of appeals below distinguished *Berry* from *Hayward*

The decision below is also consistent with the decisions of the highest courts of California and Washington, the only state courts in which a similar question has arisen. The statutes at issue in both *Curtis v. Board of Supervisors*, 7 Cal. 3d 942, 104 Cal. Rptr. 297, 501 P.2d 537 (1972); and *City of Seattle v. State of Washington*, 103 Wash. 2d. 663, 694 P.2d 641 (1985) (*en banc*), created a property-based classification of voters in an election of general interest, thereby empowering property-owners to override the votes of non-property owners. Both courts examined and invalidated these provisions under the strict scrutiny standard of the Equal Protection Clause.

In *Curtis*, the California Supreme Court held that a municipal incorporation statute granting the owners of 51 percent of the assessed valuation of the land within the area proposed for incorporation the power to prevent the incorporation election violated the Equal Protection Clause. The court found it unnecessary to decide whether the property-owner petition "protest" procedure constituted an "election:" the analysis "is not limited to statutes establishing electoral qualifications as such but extends to laws which 'touch upon' or burden the right to vote." 501 P.2d at 544. This much followed from the decisions of this Court applying the strict equal protection test not only to laws denying persons the right to vote (*e.g.*, *Kramer v. Union Free*

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on the fact that there was "no election" in the annexation procedure at issue in *Berry*. (Pet. App. 4a-5a.) The Fourth Circuit thus found this case closer to *Hayward* than *Berry* (Pet. App. 5a), since the Maryland statute, like the statute in *Hayward*, commits the final decision on municipal incorporation to voters in an election.

School District, 395 U.S. 621 (1969),[8] but also to laws conditioning voting upon the payment of a fee (*Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966)), and diluting the vote of residents of one locality against those of another (*e.g.*, *Reynolds v. Sims*, 377 U.S. 533 (1964)). 501 P.2d at 544. The *Curtis* court concluded that "a statute which confers power to halt an election, and thus to prevent all qualified voters from casting their vote, must be considered to 'touch upon' and to 'burden' the right to vote, and therefore must be examined under strict equal protection standards." 501 P.2d at 546.

In *City of Seattle*, the Supreme Court of Washington held that a state statute providing that 75 percent of the property owners in the area could, by petition, terminate proceedings that would otherwise lead to annexation of the area upon the favorable vote of the area residents violated the Equal Protection Clause. Relying on the decisions of this Court (*e.g.*, *Hill v. Stone*, 421 U.S. 289, 297 (1975);[9] *Williams v. Rhodes*, 393 U.S. 230 (1968)), as well as *Curtis* and *Hayward*, the court determined that the veto power given to the property owners through the petitioning process "restricts the effective franchise and burdens the right to vote" of the general electorate and did not "promote a compelling state interest." 694 P.2d at 647.

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[8] In *Kramer*, this Court held that in elections of general interest, such as school district elections, restrictions on the franchise other than residence, age, and citizenship must promote a compelling state interest to survive constitutional challenge. 395 U.S. at 627.

[9] In *Hill*, this Court invalidated a state statute establishing a "dual box election procedure" in which bond issues could not be approved without a majority vote of property-owning taxpayers.

Both state courts recognized, as did the court below, that a petition and an election were necessary parts of the same electoral process established by the state law. These courts recognized as well that giving certain property owners the power to block an election had the same effect as if those property owners could veto an election already held.[10] *See Hill v. Stone*, *supra*, 421 U.S. at 289, n.3, 300-01 ("[i]f the renderers [property-owners] opposed the bonds, the non-renderers' votes would be of no effect, even if they produced an overall majority in favor of the bond issue.").

The decision below is thus consistent with every other decision reviewing comparable statutes.[11]

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[10] The fact that the Maryland statute empowers the County Board or Council to decide whether to submit the question of municipal incorporation to a referendum is of no consequence to the constitutional issues presented in this case. The district court recognized that a referendum nearly always results once the statute's petitioning requirements are satisfied. (Joint App. 91.) At all events, as in *Curtis* and *City of Seattle*, the veto power accorded to property owners assures that the issue of incorporation will never be presented to the voters regardless of the views of the local governing Board or Council.

[11] The decision below is not at odds with those decisions upholding property-owner petitioning requirements when the final decision on annexation is vested with a governing board and not the general electorate. *See Carlyn v. City of Akron*, 726 F.2d 287 (6th Cir. 1984); *Berry v. Bourne*, 588 F.2d 422 (4th Cir. 1978); *Jefferson Tp. v. City of West Carrollton*, 517 F.Supp. 417 (S.D. Ohio 1981), *aff'd*, 719 F.2d 1099 (6th Cir. 1983); *Goodyear Farms v. City of Avondale*, 148 Ariz. 216, 714 P.2d 386, *app. dismissed*, 477 U.S. 901 (1986). Although the challenged statute was upheld in each of these cases, none of these statutes committed final authority to voters through an election. *Carlyn*, 726 F.2d at 289-90; *Berry*, 588 F.2d at 424; *Jefferson*, 517 F.Supp. at 420-21; *Goodyear*, 714 P.2d at 389.

4. The decision below follows a long line of this Court's decisions, of which *Quinn v. Millsap*, ___ U.S. ___, 109 S. Ct. 2324 (1989) is the most recent. In *Quinn*, this Court struck down—on Equal Protection grounds—a state law requiring that a person own real property in order to be appointed to a government board, despite the fact that the board exercised no general governmental powers. The board's function was solely to *recommend* proposals for changes in local government, which were then presented for a vote to the electorate. There was no requirement that the board of property holders make any particular form of recommendation. The Court unanimously concluded that the statute could not even pass the rational basis test; therefore, there was no need to consider whether the strict scrutiny standard applied. The Court specifically rejected the notions that property owners have greater knowledge of the problems of a geographical area and a greater stake in the long term future of the area. (*Id.* at 2332.) A board composed exclusively of property owners, like that involved in *Quinn*, is directly comparable to the 25 percent of the owners of the assessed value of real property required by Maryland law for municipal incorporation: neither requirement can withstand scrutiny under the Equal Protection Clause.

Petitioners do not and cannot contend that the decision below conflicts with any of the recent decisions of this Court respecting property restrictions that burden the exercise of voting rights. The decision below is also consistent with the numerous decisions over the past twenty years in which this Court has held that the Equal Protection Clause does not permit states to favor persons on the basis of wealth or property when matters of general interest, such as the form of local gov-

ernment, are committed by the states to the final decision of the public through an election.[12] This fundamental rule applies even if the state need not have committed the matter in question to resolution through an election. These cases uniformly hold that such wealth or property-based classifications are invalid under the Equal Protection Clause unless justified by a "compelling state interest." Here, the provision operates as both a property and wealth-based classification.

If petitioners' argument that "petitioning is not voting" were valid, states could easily evade these constitutional principles. Classifications identical to those rejected by this Court cannot be sustained merely because they appear in the guise of prerequisites for a general election.[13]

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[12] *E.g., Hill v. Stone, supra,* 421 U.S. at 297; *Cipriano v. City of Houma,* 395 U.S. 701 (1969) (invalidating state statute which limited franchise in municipal-bond election to property owners); *Phoenix v. Kolodziejski,* 399 U.S. 204 (1970) (invalidating state statute restricting franchise in general-obligation bond referenda to real-property taxpayers); *Kramer v. Union Free School District, supra,* 395 U.S. at 629, n.11 ("no less a showing of a compelling justification for disenfranchising residents is required merely because the questions scheduled for the election need not have been submitted to the voters").

[13] Such an approach would also conflict with this Court's decisions subjecting to strict scrutiny analysis a number of pre-election practices that have utilized wealth or property-based classifications. *See, e.g., Lubin v. Parish,* 415 U.S. 709, 716 (1974) (striking down requirement of filing fee in order for a candidate to be placed on a ballot in primary election); *Bullock v. Carter,* 405 U.S. 134, 144 (1972) (Texas ballot filing fees must be "closely scrutinized" under the Equal Protection Clause to determine if they limit voters' choice of candidates based on wealth); *Harper v. Virginia State Board of Elections,* 383 U.S. 663 (1966) (invalidating statute conditioning voting upon payment of a fee).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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